TEH HOCK LEONG

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD MAAROP JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: B-05-84-2003]
14 MAY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in methamphetamines - Appeal against conviction and sentence - Judicial appreciation of defence evidence - Prima facie case - Mens rea possession - Defence story - Findings of fact*

The appellant was charged with trafficking in methamphetamines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). The appellant was apprehended at the Kuala Lumpur International Airport by police acting on information given. He was carrying a backpack, which on subsequent examination was found to contain three wet towels and three pieces of underpants. These items were sent for chemical analysis and were found to contain 580.3 grams of methamphetamines. The appellant was subsequently convicted and sentenced to death, resulting in the present appeal. The main argument raised by the appellant was the failure of the trial judge to judicially appreciate the defence evidence. The appellant did not dispute that he had carried the wet items, but that he came to have them in his backpack because a friend of his, one Ah Keong, had requested that the appellant bring back some items of clothing that Ah Keong had left behind in Chiang Mai. The judge found that a *prima facie* case of trafficking had been established, and in particular that the element of *mens rea* possession had been proved. He also found that the appellant's story was inherently incredible and did not make sense.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) There was no failure by the judge to judicially appreciate the evidence as he had, on the facts, asked himself the correct question and subjected the totality of the evidence led before

him to critical examination. The judge was entirely correct in the view he had expressed about the quality of the defence and the explanation given by the appellant. It is true that *mens rea* possession is an element of the offence of trafficking. But it is an element like the mental element in other crimes which cannot be established by direct evidence save in a case where an accused expressly admits the commission of the offence. It has, like the *mens rea* in other offences, to be established by circumstantial evidence. In other words, it is an ingredient that is to be inferred from the totality of the circumstances of a particular individual case. In the present instance, the method to bring the drugs in question from Thailand into Malaysia was most cunningly employed to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. It all depends of the facts of each individual case. In this case, the judge gave sufficient consideration of the conflicting testimonies of the relevant witnesses and at the end of the day, his findings were entirely fact sensitive. In accordance with settled principle, such findings could not be interfered with. (paras 6, 7, 8 & 11)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh dengan pertuduhan mengedar methamphetamines, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Perayu ditangkap polis di Lapangan Terbang Antarabangsa Kuala Lumpur atas maklumat yang diterima. Perayu ketika itu membawa satu beg galas di mana setelah diperiksa didapati mengandungi tiga tuala basah dan tiga helai seluar dalam. Barang-barang tersebut kemudian dihantar untuk analisa kimia dan didapati mengandungi 580.3 gram methamphetamines. Berikutnya perayu telah disabit dan dihukum mati sekaligus membangkitkan rayuan di sini. Secara pentingnya perayu berhujah bahawa hakim bicara telah gagal menilai keterangan pembelaan dengan penuh kehakiman. Perayu tidak mempertikai telah membawa barang-barang basah berkenaan, tetapi menyatakan bahawa barang-barang tersebut berada di dalam begnya kerana seorang kawan beliau, bernama Ah Keong, telah meminta beliau membawa balik barang-barang pakaian Ah Keong yang tertinggal di Chiang Mai. Hakim mendapati kes

prima facie pengedaran telah dibuktikan, khususnya mengenai elemen *mens rea* milikan. Beliau juga mendapati bahawa cerita perayu amat tidak boleh dipercayai dan tidak masuk akal.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Tidak ada kegagalan di pihak hakim untuk menilai keterangan secara kehakiman. Berdasarkan fakta, beliau telah bertanyakan soalan yang betul dan telah mentaklukkan keseluruhan keterangan yang ada di hadapannya kepada pemeriksaan rapi. Hakim betul sepenuhnya dalam pandangannya mengenai kualiti pembelaan serta penjelasan yang diberikan oleh perayu. Adalah betul bahawa *mens rea* milikan adalah satu elemen dalam kesalahan pengedaran. Namun ia adalah satu elemen yang seperti juga elemen mental dalam jenayah-jenayah lain tidak boleh dibuktikan melalui keterangan terus kecuali dalam kes di mana tertuduh sendiri mengaku melakukan kesalahan tersebut. Seperti mana *mens rea* dalam kesalahan-kesalahan lain, ia perlu dibuktikan melalui keterangan ikut keadaan. Dengan kata lain, ia adalah ingredien yang perlu diandaikan dari keseluruhan halkeadaan kes. Dalam kes semasa, cara membawa dadah berkenaan dari Thailand ke Malaysia dibuat dengan sangat licik bagi mengelak dari dijejaki oleh pihakberkuasa. Cara yang digunakan untuk membawa atau menghantar dadah kadang kala menyerlahkan bukti mengenai pengetahuan. Contohnya, percubaan yang teliti untuk menyorok dadah mungkin menunjukkan niat untuk mengelak dari dijejaki dan dengan itu menunjuk kepada pengetahuan. Ianya bergantung kepada fakta sesuatu kes. Dalam kes ini, hakim telah memberi pertimbangan yang secukupnya kepada keterangan-keterangan bercanggah yang diberikan oleh saksi-saksi relevan dan pada analisa terakhir dapatan-dapatan beliau adalah berdasarkan fakta. Dapatan-dapatan sedemikian, selaras dengan prinsip-prinsip mantap, adalah tidak boleh diganggui.

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Ye Wei Gen v. PP [1999] 4 SLR 101 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)

For the appellant - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar
For the respondent - Wong Chiang Kiat DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-3-2000]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] The appellant before us was charged with an offence of trafficking 580.3 grams of methamphetamines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under the 2nd subsection of that section. The facts of the case are these. On 27 June 1999 at about 5pm or thereabouts, PW5, ASP Maidu bin Abu Bakar the Head of the Narcotics Division of the police station at the Kuala Lumpur International Airport (KLIA) received information about an offence of trafficking at the KLIA. At about 5.30pm he positioned himself with some of his fellow officers at arrival gate B6. Shortly later, he saw the appellant emerge. The appellant was stopped. He was carrying a backpack (exh. P5) which on subsequent examination was found to contain three wet towels and three pieces of underpants. PW5 noticed the towels to emit an acidic smell. He became suspicious. He had these items sent to the chemist. Chemical analysis later confirmed the towels and the underpants to contain 580.3 grams of methamphetamines, a proscribed drug under the Act. The appellant was charged and convicted of the offence of trafficking and the mandatory death sentence was passed on him. He has now appealed to us.

[3] The main argument raised in support of the appeal is that the learned trial judge did not judicially appreciate the defence evidence. The appellant did not dispute that he was carrying the wet items. His story was as follows. He has a friend called Ah Keong who from time to time gives him work to do. The appellant

has a wife who runs a restaurant in Chiang Mai. He visits her regularly. On 18 June 1999 he left for Chiang Mai to visit his wife. About two days after his arrival there, his wife received a telephone call from Ah Keong requesting that the accused bring back to Kuala Lumpur some items of clothing that he (Ah Keong) had left behind in Chiang Mai. And that is how the appellant came to have the wet items in his backpack.

[4] The learned trial judge found that the prosecution had established a *prima facie* case of trafficking at the close of its case. In particular he was satisfied that the element of *mens rea* possession had been proved. This is how he put it:

> On the evidence, there can be no doubt whatsoever that the accused was carrying the drug at the material time and place as stated in the charge. The only question is: did the accused know that he was carrying methamphetamine? In my opinion, from the whole evidence, in particular, the evidence of the wet items, *prima facie*, the accused knew that what he was carrying was methamphetamine. Turning the methamphetamine into a solution and, thereafter, having the towels and underpants soaked with the solution was a cunning way of carrying the prohibited drug. The objective was clearly to avoid detection by the authorities.

[5] In a later passage in his judgment he had this to say about the appellant's version:

> To my mind, the story as given by the accused is inherently incredible. It does not make sense. Thus I am inclined to hold the view that the story about having a friend by the name of Ah Keong and having a Thai wife is nothing but a mere fabrication.
>
> It is most unusual for a person to travel on a long journey by air carrying wet clothing, all the more so if the wet clothing belong to someone else. Prior to departure, the accused, while at the hotel, had every opportunity to have the wet clothing dried. But why didn't he do so?
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> On the hypothesis that the accused's story about having a Thai wife and a good friend, Ah Keong, were to be believed, it is very strange that neither the accused nor his wife appeared to be suspicious or at least curious as to why Ah Keong took all the trouble to make a long distance phone call from Malaysia just to ask the accused to carry his wet towels all the way from Chiang Mai to Malaysia.
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> Further there are several material inconsistencies in his evidence which, to my mind, do adversely affect his credibility.

[6] With respect to learned counsel, we are unable to agree with him that there has been a serious misdirection on the facts by the learned judge. We are also with respect unable to agree that there has been a failure by the learned judge to judicially appreciate the evidence. As can be seen from the foregoing passages the learned judge asked himself the correct question and subjected the totality of the evidence led before him to critical examination. We find ourselves entirely in agreement with the view he has expressed about quality of the defence and the explanation given by the appellant.

[7] It is true that *mens rea* possession is an element of the offence of trafficking. But it is an element like the mental element in other crimes which cannot be established by direct evidence save in a case where an accused expressly admits the commission of the offence. It has, like the *mens rea* in other offences, to be established by circumstantial evidence. In other words it is an ingredient that is to be inferred from the totality of the circumstances of a particular individual case. We can here do no better than to quote from the judgment of Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, at p. 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an expressed admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, **in the absence of any plausible explanation by him,** be irresistible- even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

[8] Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

[9] In the course of his arguments learned counsel for the appellant made a complaint about the findings of the learned judge that the existence of the appellant's wife was a fiction. Learned counsel drew our attention to the several documents discovered from the backpack (exh. P5) which, he said plainly proved that the wife was not a fictitious person. It was emphasized that these documents were all produced by the prosecution as its exhibits and no attempt was ever made to discredit them in the course of its case. The point here made is that once the judge wrongly found the wife to be fictitious, his finding that Ah Keong was also fictitious becomes suspect. We have given very careful consideration to this important submission. However we have come to the conclusion that there is no merit in it. We will say why this is so.

[10] It was absolutely essential for the prosecution to introduce the documents in question as part of the unfolding of its case. However in the course of considering the defence explanation it became fairly clear that the story put forward was wholly incredible for the reasons given by the learned judge which we find unnecessary to repeat here. Once the explanation failed on its own inanition, the existence or non existence of the wife bore no relevance to the existence or otherwise of Ah Keong. The learned judge having held that Ah Keong did not exist, the defence of innocent carrier raised by the appellant fell to the ground.

[11] As we have already said the conflict in and between the testimony of the relevant witnesses was taken into account by the judge. He gave it sufficient consideration. At the end of the day his findings are entirely fact sensitive. In accordance with settled principle, this Court does not interfere with such findings. See, *Andy Bagindah v. Public Prosecutor* [2000] 3 CLJ 289; *Ye Wei Gen v. Public Prosecutor* [1999] 4 SLR 101.

[12] For the reasons given this appeal is dismissed. The conviction and sentence are affirmed.